

**Cal-Maine Farms, Inc. and United Food and Commercial Workers International Union, Local 1529, AFL-CIO-CLC.** Case 15-CA-10588

April 30, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY, OVIATT, AND RAUDABAUGH

On August 16, 1989, Administrative Law Judge Howard I. Grossman issued the attached decision. Thereafter the Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

On February 22, 1991, Administrative Law Judge Grossman issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in opposition to the Respondent's exceptions.

The Board has considered the judge's decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**I. BACKGROUND**

The Respondent's Edwards, Mississippi facility includes an egg laying and processing operation. This operation consists of an older group of laying houses and a separate packing plant, collectively called the "Old Farm," and a "New Complex" that became operational in about July 1989, comprising automated laying houses and its own processing plant. It is undisputed that, for years before April 1, 1988,<sup>2</sup> the Respondent processed eggs produced from several other suppliers as well as those laid at the Edwards farm. The other sources included farmers in Mendenhall, Mississippi, who were under contract to Cal-Maine.

The unit employees work in the packing plant, cleaning, sorting, and otherwise preparing chicken eggs for sale. Eggs are packed 30 dozen to a case, and 15 cases to a dolly. The small trucks used to transport Edwards-laid eggs around the complex can carry eight dollies. The parties agree that, prior to April 1, 1988, shipments of eggs received from outside sources often arrived aboard 18-wheel tractor-trailers, which can carry loads far greater than 8 dollies. Until the new

complex was built, tractor-trailers could be unloaded only at the trailer high-loading dock at the packing plant.

The Union filed a petition to represent the unit employees<sup>3</sup> in November 1987.<sup>4</sup> An election took place in March 1988. The tally was 60 votes for, and 4 against, the Union. The Union was certified as the exclusive bargaining representative of the unit employees on April 7, 1988.

In May 1988, the Union filed a charge stating that the Employer had failed to recognize or bargain with the Union. A complaint issued in June 1988. Both the Respondent and the General Counsel filed Motions for Summary Judgment, which the Board denied. The Board remanded the matter for a hearing.

At the time of that hearing in May 1989, the rule governing the exemption of agricultural workers had been set forth by the Board in *DeCoster Egg Farms*, 223 NLRB 884 (1976). The so-called "single-egg test" of *DeCoster* "limit[ed] the exemption to those processors who deal *exclusively* with their own goods." 223 NLRB at 88 (emphasis added). In light of *DeCoster*, the administrative law judge defined the issue for adjudication at the May 1989 hearing as "whether Respondent's employees at the Edwards egg packing plant processed only eggs produced at that facility after April 1, 1988, or also processed eggs produced elsewhere." In his original decision, the judge decided that the Respondent had failed to show the necessary exclusivity of origin. As noted, the Respondent has excepted to that decision.

While the Respondent's exceptions to the judge's decision were pending, the Board issued its decision in *Camsco Produce Co.*, 297 NLRB 905 (1990), which overruled *DeCoster* to the extent it was inconsistent with the formulation of the rule announced in *Camsco*. The Board subsequently remanded the case to the judge to consider the impact of the new rule in *Camsco* on the result in this case. *Camsco* held that the agricultural exemption would be based on whether the employees in question *regularly* handle the products of outside producers. Thus the "single egg test" of *DeCoster* was replaced by the *Camsco* "regularity" standard. The party seeking exemption from the Act—here, the Respondent—has the burden to establish that outside produce is not regularly handled by the em-

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>April 1, 1988, is the date after which, the Respondent asserts, outside eggs no longer were processed at Edwards. The Union was certified on April 7, 1988. Throughout this decision, we refer to the critical date as April 1, 1988.

<sup>3</sup>The unit consists of all production and maintenance employees employed at the Respondent's Edwards, Mississippi egg packing plant, excluding all guards, office clerical employees, buyers, salesmen, quality control employees, professional employees, confidential employees, and supervisors as defined in the Act.

<sup>4</sup>In February 1988, the Employer argued in a representation proceeding that the Board lacked jurisdiction because the employees in question were exempt from the Act as agricultural laborers. Finding that the Employer had failed to prove its assertion that it would cease processing eggs from outside producers after April 1, 1988, the Regional Director for Region 15 rejected the exemption argument and directed an election. The Board denied review.

ployees seeking representation. *Camsco*, 297 NLRB 905, *supra*.

The judge issued his supplemental decision after a 1-day supplemental hearing in October 1990 at which only the Respondent presented evidence. In that decision, the judge reaffirmed the conclusions of law and recommended Order set forth in his original decision.

## II. DISCUSSION

The Respondent sought the supplemental hearing on the grounds that it had evidence to present concerning the effect of the *Camsco* decision on the Board's jurisdiction in this case.<sup>5</sup> In his original decision, the judge found that the Respondent failed to show that unit employees handled and processed only eggs laid on the Edwards farm. The sole issue on remand was whether the receipt of outside eggs was regular, within the meaning of *Camsco*. Thus, in these circumstances, the Respondent had the burden to show by a preponderance of the evidence that after April 1, 1988, it *no longer regularly* received outside eggs at Edwards.

We agree with the judge's finding that "a review of the evidence at both hearings shows that Respondent has not established by a preponderance of the evidence that, since April 1, 1988, it has not received outside eggs at its Edwards, Mississippi processing plant on a regular basis, or, indeed, that it is not doing so at the present time." In so finding, we rely in particular on the following record evidence.

### A. Evidence of Outside Deliveries

Credited testimony by three of the General Counsel's witnesses supported the judge's original finding that outside eggs were received after the date the Respondent said such shipments ceased. Specifically, employees Daisy Bishop and Virginia Foster testified that they saw dollies and dolly-stickers from other locations arrive at the packing plant in December 1988, and January and March 1989. In addition, employee Larry Bishop testified that he saw at least one tractor-trailer arrive with a shipment of unprocessed outside eggs at the packing plant, also in early 1989.

### B. Robert Turner's Testimony

The Respondent's shipping and receiving supervisor at the Old Farm laying houses, Robert Turner, testified at the supplemental hearing.<sup>6</sup> Turner denied that outside eggs had been received at Edwards after April 1, 1988. The judge noted, however, that Turner also stat-

ed that the packing plant received outside eggs until around the time that a certain record-keeping change was made, in November 1988.

In addition, when asked whether processing plant employees remove stickers denoting the point of origin from egg dollies, Turner replied: "I don't have a lot of time to go pulling stickers off of 28 dollies or eight dollies or whatever is on the load. If it is an outside load, you would have at least 43 or 45 dollies on there." Loads of 43 or 45 dollies necessarily would be from the outside, delivered on 18-wheel trailer-trucks.

### C. Mendenhall Records

At the first hearing, the Respondent introduced the Mendenhall facility's shipping log, dated through December 31, 1988, purporting to show no shipments to Edwards after March 31, 1988. In addition, the Respondent introduced partial receiving logs for Edwards. The latter, however, did not record the Mendenhall receipts. A Respondent witness, Packing Plant Manager James King, stated that he could not recall how Mendenhall receipts were recorded, but speculated that they were listed in a separate "outside" log, which was not offered.

After the judge noted in the first decision that the records introduced were incomplete and therefore unreliable, the Respondent at the second hearing introduced one page, dated April 1, 1988, purporting to be part of the "outside log." The document did not contain a reference to egg receipts from outside sources. We agree with the judge that the proffer of the record from only one date does not inspire confidence that the records submitted in this proceeding are reliable evidence that all outside deliveries ceased on April 1, 1988.

We further note that, although the Respondent had longstanding relationships with outside suppliers of eggs prior to April 1988, it introduced no evidence, such as correspondence, notifying these suppliers of its plan to discontinue doing business with them as of April 1, 1988.

### D. Truck Drivers from Mendenhall

The Respondent presented a witness who stated he was a truck foreman at a Mendenhall, Mississippi shipping and receiving office. He denied that eggs from Mendenhall were delivered to Edwards after April 1, 1988. The judge did not credit his denial, however, finding him to be an evasive and unreliable witness. Further, the judge noted that, although the Mendenhall truck foreman was one of six or seven drivers who could have made such deliveries, the Respondent called none of the others to testify.

<sup>5</sup>The General Counsel and the Union opposed reopening the record and chose not to present evidence at the supplemental hearing.

<sup>6</sup>Turner had been available to testify at the original hearing, but the Respondent did not call him. The General Counsel and the Union objected to his testimony at the supplemental hearing on the grounds that it was previously available information.

*E. The Respondent's Correlation Between Production Records and "Run Sheets"*

The Respondent introduced, over the General Counsel's objection, an analytical document purporting to correlate egg receiving log entries with "run sheets," weekly records that track opening inventory, production (eggs laid), and dozens processed. By this document, the Respondent sought to show that hens on the Old Farm laid enough eggs to account for the processing totals at the packing plant.

The judge found, however, that the analysis revealed significant discrepancies, both overages and shortages, as it tracked each week's beginning inventory, production, and processing totals. For example, one week's figures revealed 62,985 dozen eggs more in the beginning inventory than should have remained after the previous week's production less the total processed. The judge found that these discrepancies, unexplained in the record,<sup>7</sup> "create further doubts that [the Respondent's] documentary evidence accurately reflects egg receipts at the Edwards farm."

*F. Conversation Between Supervisor Myers and Employees Bishop and Foster*

The judge also credited Daisy Bishop and Virginia Foster's testimony that their supervisor told them in December 1988 that "[the Respondent] already bought some eggs and [was] going to buy more."

### III. CONCLUSION

In sum, we agree with the judge that the Respondent failed to carry its burden of showing that the unit employees did not regularly handle the eggs of outside producers after the certification date, April 7, 1988, and that therefore the employees were not exempt from coverage by the Act.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge in his original Decision, dated August 16, 1989, and orders that the Respondent, Cal-Maine Farms, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting.

I would remand this case to the judge to determine, after further hearing, the extent to which the Respondent regularly processed eggs produced by others. See my dissent in *Camsco Produce Co.*, 297 NLRB 905 (1990).

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*Charlotte N. White, Esq.*, for the General Counsel.

*Kenneth E. Milam, Esq.* and *R. Penser Crutcher Jr., Esq.* (*Miller, Milam & Moeller*), of Jackson, Mississippi, for the Respondent.

*Roger K. Doolittle, Esq.*, of Jackson, Mississippi, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on May 9, 1988,<sup>1</sup> by United Food and Commercial Workers International Union, Local 529, AFL-CIO-CLC (the Union or the Petitioner), an amended charge on May 6, and a second amended charge on June 7. Complaint issued on June 10, and alleges that Cal-Maine Farms, Inc. (Respondent, or the Employer) refused to bargain with the Union on and after April 25, 1988, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

A hearing was held before me on these matters on May 30 and 31, 1989, in Jackson, Mississippi. On the entire record, including briefs filed by the General Counsel, Respondent, and the Union, and on my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent is a Delaware corporation with offices and a facility located in Edwards, Mississippi, where it is engaged in the production of row crops, cattle, hogs, and eggs. During the 12-month period preceding issuance of the complaint, a representative period, Respondent sold and shipped products valued in excess of \$50,000 directly to customers located outside the State of Mississippi. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The pleadings establish that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Summary of Former Proceedings

On November 9, 1987, the Union filed a petition in Case 15-RC-7347, seeking representation of the Employer's production and maintenance employees at its Edwards, Mississippi egg packing plant. After a hearing at which the Petitioner and the Employer presented evidence, the Regional Director for Region 15, on February 7, 1988, issued a Decision and Direction of Election, wherein he rejected the Employer's contention that its egg packing employees were agricultural laborers and thus exempt from the provisions of the

<sup>1</sup> All dates are in 1988 unless otherwise specified.

Act. The Regional Director concluded that the exemption was not applicable because a substantial number of the eggs were obtained from contract farmers and other sources. In addition, the Regional Director concluded, the Employer had not established, as it contended, that it would completely discontinue the procurement of eggs from these sources by April 1988.

The Employer filed a request for review on March 1, which was denied by the Board on March 14. An election conducted by the Board was held on March 30. Of approximately 75 eligible voters, 60 cast ballots in favor of the Union, while 4 opposed it. On April 5, the Employer filed with the Regional Director a motion for reconsideration with attached asserted evidence that no eggs had been processed at the Edwards facility since April 1 that had not been produced at that facility. On April 7, the Regional Director issued a certification of representative stating that the Petitioner was the representative of the Employer's production and maintenance employees at its Edwards, Mississippi egg packing plant.

The unfair labor practice complaint issued on June 10, as indicated. On July 6, the Respondent filed a Motion for Summary Judgment with the Board. On July 15, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 25, the Union filed a motion to strike affidavits attached to the Respondent's motion, or, in the alternative, a motion to dismiss the Respondent's Motion for Summary Judgment. On August 1, the General Counsel filed a Cross-Motion for Summary Judgment, and Respondent file a response.

On February 8, 1989, a panel majority of the Board issued an order denying motions, and remanded the matter to the Regional Director for a hearing. The Board concluded that the Respondent raised an issue of statutory jurisdiction based on evidence which became available after the representation hearing, and that this issue required consideration of record evidence.<sup>2</sup>

## B. Summary of the Evidence

### 1. The Edwards facility

The pleadings establish that the Union, following its certification in April 1988, requested recognition and bargaining, and that the Respondent refused to comply. The sole issue is whether Respondent's employees were exempt from the provisions of the Act as agricultural laborers. Because of decisional interpretation of the statutory exemption which is discussed hereinafter, the matter comes down to whether Respondent's employees at the Edwards egg packing plant processed only eggs produced at that facility after April 1, 1988, or also processed eggs produced elsewhere.

At the time of the hearing, the Edwards facility was a farm of about 4000 acres. Respondent had row crops, a beef cattle operation, a feed lot, pullet facilities where it brought in chicks and raised them, and laying houses where mature chickens laid eggs. It also had a processing plant where, according to Plant Manager James King, eggs were cleaned, sized, packaged, and shipped in cartons to supermarkets and

other customers. For many years, Respondent's chickens had been laying eggs at a location within the facility called the Old Farm. At the time of the hearing, Respondent was engaged in the construction of an automated New Complex which would greatly increase production. The processing plant was separate from both the Old Farm the New Complex.<sup>3</sup>

### 2. Other facilities of Respondent

Respondent owns a facility at Mendenhall, Mississippi, near the Edwards facility, which also produces eggs. However, it utilizes eggs from other farmers under contract with Respondent, unlike the Edwards facility. At least prior to April 1, 1988, some Mendenhall eggs were shipped to the Edwards facility for processing.

Respondent also owns a facility in Jackson, Mississippi, variously called an "egg products plant," or a "breaking plant." At this plant the eggs are "broken," and products such as frozen and powdered eggs are produced. The Jackson plant also handles eggs which have been determined to be substandard in accordance with Department of Agriculture regulations.

In addition, the Company owns processing plants at Hope, Arkansas; Walker, Louisiana; Gonzalez, Texas; and has a facility at Bethune, South Carolina. The General Counsel submitted evidence which, it is contended, establish the movement of eggs from some of these locations to the Edwards processing plant after April 1, 1988, while Respondent asserts that it only used eggs from the Edwards facility after that date.

### 3. Production at the Edwards facility before and after April 1, 1988

Processing Plant Manager King testified that, prior to April 1, Respondent's Edwards processing plant processed 5000 to 6000 cases of eggs daily. Of this number, 2600 to 2700 cases were received from Respondent's laying facilities at the Old Farm, located on the same premises. The rest of the eggs were received from Mendenhall or were purchased from other sources. Although egg laying was contemplated for the New Complex, none was produced therein until January 1989, according to King.

Subsequent to April 1, the Edwards processing plant processed about 3100 cases daily, while the Old Farm continued to produce about 2600-2700 cases. King explained that the processing figures were greater than the production figures because the processing plant worked 5 days a week, while "the chickens lay eggs 7 days per week." As indicated, King maintained that no eggs were received from the New Complex until January 1989, and that none was received from outside sources after April 1, 1988.

Respondent shipped some of its Old Farm eggs to its locations in Walker, Louisiana, and Gonzalez, Texas, according to King. The reason, he stated, was that these plants did not have enough business to keep operating at full capacity. Because of these shipments and the asserted absence of any off-site eggs after April 1, production declined, and King agreed that there were mornings when the processing plant could not start on time because of a shortage of eggs.

<sup>2</sup>Member Cracraft dissenting, would have granted Respondent's Motion for Summary Judgment.

<sup>3</sup>Testimony of James King, Respondent's supervisor of its Edwards processing plant, also designated as the packing plant.

#### 4. The Edwards egg-receiving logs and the Mendenhall's shipping logs

Respondent produced documents logging in eggs received at the Edwards processing plant.<sup>4</sup> The logs have seven columns, and record the date received and source of the eggs. Some columns purport to identify the laying rows. The second column in those logs through November 7 is entitled "Shipping Memo #." The entry in some of these columns is "Cal-Maine," and in others "Edwards." Processing Plant Manager King denied that "Cal-Maine" referred to eggs shipped to the plant from other of Respondent's facilities. He explained the difference between the "Cal-Maine" and "Edwards" listings on the ground that a different individual was making the entries in the logs. King could not recall how Mendenhall eggs were categorized prior to April 1, but contended that they were listed in a separate log.

Beginning on November 8 and continuing thereafter, the heading of the second column in the log was changed from "Shipping Memo #" to "Edwards." All entries in this column after that date are ditto marks.

The Mendenhall's shipping logs record shipments from that farm to the Edwards facility and other of Respondent's facilities prior to April 1, but none to the Edwards on or after that date.<sup>5</sup>

#### 5. Dollies and identifying stickers

The eggs are transported from Respondent's various laying houses to its processing plants in cases which are loaded onto dollies. There are normally 30 dozen eggs to a case, and 15 cases on a dolly. The dollies used at different locations are not the same. For example, Plant Manager King testified, the Hope, Arkansas facility uses a different type of dolly with a latch. In addition, each dolly has a sticker on it which identifies the plant at which it is used.

Daisy Bishop, an employee for many years and a packer at Respondent's Edwards processing plant, testified that in late 1988 and early 1989, she saw dollies which were different from the normal dollies used at the Edwards facility. They were a "little more complicated." Bishop first saw 20 to 30 such dollies in December 1988. She also saw some in January, and 20 to 40 in March, "just before Easter." The dollies were loaded with eggs, according to Bishop, and the ones in March had "Hope, Arkansas" stickers on them.

The witness examined a dolly sticker which Processing Plant Manager King had previously identified as a Hope, Arkansas sticker covering shipment of substandard eggs from Hope to Respondent's breaking plant at Jackson, Mississippi.<sup>6</sup> Bishop testified that the stickers she saw were unlike this one, and merely said, "Hope, Arkansas" on them. The stickers used on the Edwards dollies are smaller and require that something be written on them, unlike the stickers Bishop saw in early 1989.

On cross-examination, Respondent questioned Bishop's ability to see the incoming dollies from her worksite. She testified that she was "facing them all the time." Plant Man-

ager King contended that Bishop could not get a good view of the incoming dollies from her worksite, but agreed that her job did not require her to stay in the same location, and that she could see the incoming dollies by walking to the side. I find that Bishop could in fact see that which she described, and I credit her testimony.

Virginia Foster had been a longtime employee of the Company.<sup>7</sup> She testified that she saw "egg dollies" with various stickers on them coming into the plant the week before the hearing in this matter. Some dollies had stickers indicating that they were from Hope, Arkansas, while others came from locations in Texas. "The young man was bringing them in where we could load them on the machine." Foster testified that she was about 2 feet from the unloading, and that the stickers were affixed to the dollies with wire. She had seen 10 to 15 such dollies within the preceding 6 months. On cross-examination by Respondent, Foster was shown a Hope, Arkansas sticker for substandard eggs,<sup>8</sup> and was asked whether this was the "type" of sticker she had seen. The witness answered affirmatively, but did not know the meaning of the legend on the sticker. She agreed that she had seen dollies with various stickers on them. I credit Foster.

Plant Manager King agreed that the Edwards facility had purchased offsite eggs prior to April 1, but denied that there had been any receipt of such eggs since that date. With respect to dollies, King testified that those from various of Respondent's plants had become intermingled with dollies at other plants. King also affirmed that dollies contain "old stickers" when they go from one plant to another. Although King has a designated employee whose duty is to tear off old stickers, this employee sometimes fails to follow instructions. To buttress his testimony about old stickers, King identified six stickers dated from April 3, 1989, through May 4, 1989,<sup>9</sup> which he had torn off dollies in the Edwards cooler on the morning of his testimony (May 3, 1989). King contended that these must have been old stickers, because he never keeps eggs in the cooler longer than 2 weeks. None of these stickers has any location printed on it.<sup>10</sup> Daisy Bishop, on cross-examination concerning her testimony about dollies and stickers in late 1988 and early 1989, testified that she "never saw a Hope, Arkansas dolly in the plant until after then."

#### 6. Supervisor Myer's conversation with Daisy Bishop and Virginia Foster in December 1988

Daisy Bishop testified that she had a conversation with Processing Plant Foreman Williams C. Myers in December 1988.<sup>11</sup> The conversation took place in the lunchroom in the presence of employees Virginia Foster and David McFarland. Myers directed them to come in "late" the following morning, because he did not have "any eggs to run." Bishop advised Myers "to go buy some eggs to do the orders because we are tired. It's almost Christmas." According to Bishop, Myers replied, "We've already bought some eggs and we're

<sup>4</sup> R. Exh. 1.

<sup>5</sup> R. Exh. 2.

<sup>6</sup> This sticker bears the legend: "Restricted Eggs—for processing only in an official U.S.D.A. Egg Products Plant. Town Creek Plant. Cal-Maine Farms. Route 2 Box 16, Hope, Arkansas 71801." G.C. Exh. 5.

<sup>7</sup> Foster was discharged at the end of the last week before the hearing, i.e., on May 26.

<sup>8</sup> Supra, fn. 6. G.C. Exh. 5.

<sup>9</sup> R. Exh. 8.

<sup>10</sup> Id.

<sup>11</sup> Myers testified that he was a processing plant foreman, and that his duties were to see that the orders were filled and that the plant was run properly. I conclude that he was a supervisor within the meaning of the Act.

going to buy some more.” Bishop testified that she was surprised at this statement and that the employees were “shocked,” because they knew that the Company was not supposed to be buying any eggs.

Virginia Foster testified that she heard Myers tell Bishop in December 1988 to “sit still” and “not punch in—we don’t have any eggs.” Bishop replied, “Well, you all ought to buy some eggs,” and Myers replied, “We already are buying eggs.”<sup>12</sup>

Myers denied that any offsite eggs had been packed at the Edwards facility since April 1, and denied the statement attributed to him by Bishop and Foster. He admitted that neither employee had ever done anything to cause doubt about her honesty or truthfulness.

Plant Manager King averred that Myers had no egg-buying duties prior to April 1, when Respondent was buying eggs, and Myers testified to the same effect. However, Myers admitted that he would have known if purchased eggs had come onto the Edwards facility.

Bishop and Foster were truthful individuals, a fact admitted by Myers, himself. Daisy Bishop was a current employee at the time of her testimony. The Board has concluded in similar circumstances that such testimony is entitled to considerable weight since it is unlikely to be false when it is adverse to an employee’s pecuniary interest, such as preservation of a job.<sup>13</sup> I credit Bishop’s and Foster’s testimonies and find that Supervisor Myers, in December 1988, told them that Respondent had already bought some eggs and was going to buy more. Further, based on Myers’ admission, I find that he would have known of such purchases if in fact they had been made.

#### 7. Other evidence of delivery of eggs to the Edwards facility

Larry Bishop had worked at Respondent’s Edwards facility several times, the last time from January 1989 through mid-March. He was assigned to the Old Farm in January and was transferred to the New Complex in February. At the latter site, Bishop maintained the automated equipment which operates the laying houses.

Bishop described the internal transportation of eggs from one part of the Edwards facility to another. There is conflicting evidence about this matter, which is relevant with respect to the offsite egg issue. According to Bishop, eggs were transported from the Old Farm to the processing plant in “little bitty trucks with little old bob-tail trailers.” Plant Manager King corroborated this testimony. Further according to Bishop, eggs were transported from the New Complex to the processing plant in “white farm trucks” maintained at the processing plant. These trucks would come down to the New Complex, load eggs, and take them back to the processing plant. According to Bishop, these trucks were not used for hauling eggs on the road, and never left the Edwards facility. Plant Manager King, on the contrary, testified that eggs were transported from the New Complex to the processing plant in “18-wheelers,” because the New Complex dock was at “trailer height.” The 18-wheelers transported

eggs from the New Complex either to the processing plant or to other destinations outside the Edwards facility. Called as a witness for the General Counsel, Plant Manager King was asked whether there would “ever be any occasion for an eighteen wheeler to bring eggs down to the New Complex” from the processing plant. His answer was, “No.”

Bishop testified that he saw 18-wheel tractor-trailers appear at the New Complex from time-to-time during his last period of employment at the facility, in 1989. Some contained dirty, unprocessed eggs on dollies which had stickers labelled “Hope, Arkansas,” and another which Bishop believed to be “Blue Hill,” or “Blue Ridge.” Bishop testified that some of these dollies with their eggs were off-loaded at the New Complex dock, and placed in the New Complex cooler for a short time. Bishop affirmed that he tore off some of the stickers. He saw the tractor-trailers appear at the New Complex dock several times a week over a 6-week period, although not all of them had eggs.

After apparently specifying several trailers with eggs, Bishop identified one particular truck as the one he saw with the “eggs on it.” It was a red Mack tractor-trailer rig operated by a driver named Ford. This truck came to Edwards facility every morning. Bishop believed that it came from Mendenhall, but had no exact knowledge of its origin.

Bishop was not an entirely satisfactory witness in that his meaning was unclear at times, he appeared to contradict himself, and he required repeated questioning to elicit his meaning, with these reservations, I conclude that Bishop affirmed that he saw 18-wheel tractor-trailers at the New Complex dock in early 1989, and that at least one of them unloaded unprocessed eggs in dollies bearing “Hope, Arkansas” and “Blue Hill” or “Blue Ridge” stickers. Although Bishop averred that some vehicles did not unload eggs, it is unclear whether he affirmed that one or more than one vehicle did unload eggs. The one truck which he identified specifically was a red Mack tractor-trailer driven by a driver named Ford.

Plant Manager King was again called as a witness, this time for Respondent, and was again asked whether Respondent ever moved eggs from the “packing plant” to the cooler at the New Complex. He replied that during the past Easter he ran out of storage space in the “main cooler” in the “old plant”—by which he apparently meant the processing plant. According to King, there is strong demand for eggs on Thanksgiving, Christmas, and Easter. Accordingly, King testified, he shipped eggs from the processing plant to the New Complex cooler for temporary storage. These eggs were shipped in cardboard cases or boxes.

Respondent points to King’s statement as an explanation of Bishop’s testimony asserting receipt of eggs at the New Complex cooler.<sup>14</sup> The processing plant operation, described by King, involved various steps including cleaning, and ending in the packing of presumably clean eggs in “cartons” ready for shipment to customers. If it was these eggs, in cardboard “cases” or “boxes,” which King shipped to the New Complex cooler prior to Easter, there is no explanation in the record why he did not immediately ship them out to customers in response to the strong pre-Easter demand for eggs. If, nonetheless, King shipped clean eggs back to the New Complex cooler, his testimony does not offset Larry

<sup>12</sup> The third employee, McFarland, was deceased at the time of the hearing, according to Bishop.

<sup>13</sup> *Bohemia, Inc.*, 266 NLRB 761, 764 fn. 13 (1983); *Southern Paint & Waterproofing Co.*, 230 NLRB 429, 431 fn. 11 (1977).

<sup>14</sup> R. Br. 6–7.

Bishop's averment that he saw dirty, unprocessed eggs being unloaded at the New Complex from 18-wheel tractor-trailers.

If King meant that he shipped dirty, unprocessed eggs in 18-wheelers to the New Complex cooler, this necessarily entailed the reshuffling of such eggs either received from the Old Farm or back and forth between the New Complex and the processing plant. This would appear to have involved unnecessary time and expense. Finally, whether it was clean or dirty eggs that King claimed to have shipped back to the New Complex, his latter testimony affirming this is contradicted by his earlier denial that any such shipment took place.

Howard Ford testified that he was a local truckdriver employed at Respondent's Jackson, Mississippi breaking plant. He drives a red 1979 Ford diesel truck. According to Ford, the breaking plant receives dollies from various of Respondent's plants, including Hope, Arkansas. After the eggs are unloaded at Jackson, one of Ford's functions is to drive empty dollies to the Edwards facility, where he delivers them either to the Old Farm or the New Complex. On occasion he then picks up eggs from the Edwards facility and delivers them to the Jackson breaking plant. Ford denied delivering any eggs to the Edwards facility.

Ford affirmed that he does pick up eggs at Mendenhall and deliver them to the Jackson breaking plant, where frozen and powdered eggs are produced. The last time he had done this was about 4 months before the hearing. According to Ford, he was a "refill" for one of "their [Mendenhall's] trucks."

Derek Hilton was an over-the-road driver stationed at the Edwards facility, where he worked for a freight company which was a subsidiary of Respondent. His principal function was to haul eggs long distances between Respondent's plants located in different States. Prior to April 1, Hilton delivered eggs to the Edwards facility. In early 1988, he was instructed that there were to be no more deliveries of eggs to that facility. If the truck's destination was nearby Jackson, and had eggs on it, Hilton was not permitted to enter the Edwards facility for fuel at the truckstop. He stated that he never delivered any eggs from Mendenhall to Edwards. Any such deliveries, of which Hilton had no knowledge, would have been made by one of the Mendenhall's truckdrivers. There were five or six Mendenhall drivers, according to Hilton.

#### 8. Factual analysis

"Procedurally," Respondent states in its brief, this is a certification test case.<sup>15</sup> Respondent agrees that it bears the burden of proof in this matter,<sup>16</sup> but argues that, in the underlying representation proceeding, it was erroneously required to prove its case "beyond a reasonable doubt." Instead, Respondent contends, it should only be required to establish its position by a "preponderance of the evidence," citing various authorities.<sup>17</sup>

<sup>15</sup> R. Br. 1.

<sup>16</sup> See *Emerson Electric Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981); *Sanitas Service Corp.*, 272 NLRB 50, 51 (1984); *Mattison Machine Works*, 120 NLRB 58 (1958).

<sup>17</sup> *Pan American Optical Co.*, 211 NLRB 50, 51 (1974); *George Transfer & Rigging Co.*, 208 NLRB 494, 497 fn. 12 (1974); *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950). R. Br. 12.

Learned authority has argued that the "preponderance" of the evidence is not identical with belief in that evidence:

What those who have laid down the principle that "preponderance" of evidence will justify and require a decision conformable with it, have failed to realize, is that perception of the preponderance of the evidence is quite consistent with want of belief. Of two pieces of very weak evidence, one may preponderate. It might be barely enough to convince, had it not encountered the contradictory evidence. Opposed by the latter, it may be insufficient to generate even the lowest degree of belief. To detect a preponderance of evidence that B signed a note, is neither to believe he signed it, nor to be logically required to believe that he signed it. It would be fatuous to affirm that a man ought to believe, even faintly, everything the evidence for which is, in his opinion, stronger than the evidence against it.

There is no measure of the weight of evidence [unless the witnesses on the evidential facts are counted] other than the *feeling of probability* which it engenders.<sup>18</sup>

The evidence in support of Respondent's case consists of the denials of King and Myers that any offsite eggs were received at the Edwards facility after April 1, the denials of a local truckdriver stationed in Jackson (Ford) and an over-the-road driver stationed at Edwards (Hilton) that they ever made such deliveries, together with the Edwards receiving logs and the Mendenhall's shipping logs.

The General Counsel submitted evidence supporting an opposite inference, which evidence Respondent in turn sought to rebut. Thus, in response to the testimonies of Daisy Bishop and Virginia Foster of dollies loaded with eggs with stickers from other facilities in late 1988 and early 1989, Respondent elicited testimony that dollies from various facilities were generally intermingled, and that an employee designated to remove such stickers at Edwards had not performed his duties. In addition, one particular sticker was clearly such a sticker, intended to direct substandard eggs from Hope, Arkansas, to the breaking plant in Jackson. Further, there were stickers over 2 weeks' old on dollies in the Edwards cooler at the time of the hearing—and Respondent does not keep eggs for that period of time.

None of Respondent's arguments on the dolly-sticker issue is persuasive. Although it is not unlikely that some dollies with stickers from other facilities may have arrived at Edwards without removal of the sticker—as is evidenced by the substandard egg sticker—this was contrary to Respondent's policy to remove such stickers, a policy supposedly enforced by a designated employee. Although this employee may have overlooked a few stickers, it is unlikely that he would miss as many as were indicated in Daisy Bishop's and Virginia Foster's testimonies. Foster's description of "egg dollies" with Hope, Arkansas, and other stickers coming into the plant the week before the hearing, for loading "on the machine," does not mention any employee removing stickers. The fact that the substandard egg sticker intended for Jackson was not typical of these stickers is explicitly established

<sup>18</sup> W. Trickett, *Preponderance of Evidence, and Reasonable Doubt*, 10 Dick. L. Rev. 76 (1906), quoted in Wigmore, *Evidence*, Vol. 9, § 2498, p. 420 (Chadbourn ed. 1981).

by Daisy Bishop's testimony. Respondent's argument based on stickers from the Edwards cooler the morning of the hearing has no merit. Unlike the Hope, Arkansas, stickers, these stickers had no location imprinted on them, and may well have been stickers from the Edwards site itself.

Larry Bishop's testimony about receipt of unprocessed eggs at the New Complex in 18-wheel tractor-trailers at the New Complex in early 1989 is not as strong as that of Daisy Bishop and Virginia Foster, because he was not as reliable a witness. Nonetheless, his testimony has probative weight. Plant Manager King's testimony seeking to rebut Bishop's is even less reliable, for the reasons given above. The witness named "Howard Ford" presented by Respondent may not be the same driver named "Ford" referred to in Larry Bishop's testimony. According to Bishop, the driver he named was operating a red *Mack* tractor-trailer rig, while Howard Ford testified that he drove a red *Ford* diesel truck. There may well have been another driver named "Ford," perhaps stationed at Mendenhall, who drove a red *Mack* tractor-trailer rig. Derek Hilton's testimony that *he* did not deliver any eggs to the Edwards facility after April 1, if credited, established only that. Although it is clear that Respondent's nearby facility at Mendenhall delivered eggs to Edwards before April 1, and that Mendenhall had five or six drivers, none of these drivers was called as a witness for Respondent. Instead, it called a local driver from Jackson (Ford) whose only regular delivery of eggs was from Mendenhall to Jackson, and an over-the-road driver (Hilton) who had never delivered eggs from Mendenhall to Edwards. I conclude that Larry Bishop's testimony tends to corroborate that of Daisy Bishop and Virginia Foster concerning delivery of offsite eggs after April 1.

One of the strongest elements in the General Counsel's case is the statement by Supervisor Myers to employees in December 1988 that Respondent had already purchased eggs and intended to purchase more. Respondent's argument that Myers, himself, did not purchase the eggs has no merit, since he admittedly would have known if such purchases had been made. It is highly unlikely that Myers would have made such a statement to employees if it was not in fact true.

Respondent's documentary evidence, the Edwards egg-receiving logs and the Mendenhall shipping logs, constitute hearsay evidence receivable under the business records exception to the hearsay rule.<sup>19</sup> The Edwards logs purport to show the absence of entries of receipts of offsite eggs after April 1. The validity of an inference based upon the absence of such entries has been stated as follows:

The *absence of an entry*, where an entry would naturally have been made if a transaction had occurred, should ordinarily be equivalent to an assertion that no such transaction occurred, and therefore should be admissible in evidence for that purpose.

The contrary attitude of some courts is lamentable. When a book purports to contain all items transacted within the scope of the book's subject, the absence of an entry of transaction of a specific purport is in plain implication a statement by the maker of the book that no such transaction was had.<sup>20</sup>

The Edwards receiving logs, however, do not purport "to contain all items transacted within the scope of the book's subject,"<sup>21</sup> i.e., the receipt of eggs at the Edwards facility. According to Plant Manager King, the Mendenhall eggs were recorded in a separate log, and this document is not in evidence. Further doubt about the Edwards records is raised by King's asserted lack of recall of the manner in which the Mendenhall eggs were categorized, and by the unexplained change in the heading of the second column of the log.

The Mendenhall's shipping logs do purport to represent all shipments from that facility, and indicate an absence of entries of shipments to Edwards after April 1. However, the logs do not purport to record shipments to Edwards from any other facility, such as Hope, Arkansas.

The accuracy of Respondent's documents is dependent upon the absence of a motive to misrepresent. "This does not mean that the offer or must show an absence of all such motives, but merely that if the existence of a fairly positive counter-motive to misrepresent is made to appear in a particular instance the entry would be excluded."<sup>22</sup> In commenting on the business records exception to the hearsay rule, the advisory committee's note in the Federal Rules of Evidence states that "hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity," and cites cases where records prepared prior to litigation were improperly received.<sup>23</sup>

The history of this litigation shows that Respondent argued in the underlying representation proceeding that no offsite eggs would be processed at Edwards after April 1, and, in the instant proceeding, continued to argue that this was in fact the case. While it may be inappropriate to infer that the record of this proceeding establishes a "motive to misrepresent" Respondent's business records, it does at the very least prove Respondent's strong interest that those records establish a particular fact.

For these reasons, I conclude that Respondent's books and records constitute relatively weak evidence that no eggs were received at Edwards after April 1.

The record shows that, after April 1, Respondent's production at Edwards dropped to a little more than half the amount prior to that date. The decline was attributable to the absence of offsite eggs, according to Plant Manager King. On some occasions, processing was delayed because of the absence of eggs. This decline in production must have had an adverse economic effect on the Edwards facility, particularly with the later increase in demand during the Thanksgiving, Christmas, and Easter holidays. These factors tended to make it economically advantageous for the Edwards facility to purchase offsite eggs. Although this factor, like others in this case, is not conclusive, it does show that the factual pattern indicated by the General Counsel's evidence would not have been inconsistent with Respondent's economic interest.

I conclude that Respondent has not established by a preponderance of the evidence that it did not purchase and process offsite eggs at the Edwards facility after April 1.

<sup>19</sup> Fed.R.Evid. 803(6).

<sup>20</sup> Wigmore, *Evidence*, Vol. 5, § 1531 (Chadbourn ed. 1974), emphasis in original.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, § 1527.

<sup>23</sup> Fed.R.Evid. § 803(6), Advisory Committee's Note, p. 117.



### 9. Legal analysis and conclusions

Section 2(3) of the Act excludes from the definition of "employee" any "individual employed as an agricultural laborer," and Congress annually adds a rider to the Board's appropriation bill stating that the term "agricultural laborer" shall be defined in a manner consistent with Section 3(f) of the Fair Labor Standard Acts. The Supreme Court has interpreted that section to include the raising of poultry as a "primary" farming operation.<sup>24</sup> Employees employed in egg-processing may be determined to be engaged in "secondary" farming operations incidental to "such [primary] farming operations."<sup>25</sup> The Department of Labor has interpreted the phrase "such farming operations" to exclude practices performed with respect to farm commodities unless "all" such commodities are the products of that particular farm.<sup>26</sup>

The Board has stated as follows:

[W]e are of the view that this regulation must be read as limiting the exemption to those processors who deal exclusively with their own goods. [*DeCoster Egg Farms*, 223 NLRB 884, 886 (1976).]

Respondent argues that the *DeCoster* rule is a "narrow, literal reading" of one regulatory passage, and that the Board should return to a "more balanced approach."<sup>27</sup> Inasmuch as I am bound by Board law, this is an argument appropriately addressed to the Board. Under current law, since Respondent has not sustained its burden of proving that all eggs processed at the Edwards facility after April 1 were produced on that farm, the employees engaged in that work were not "agricultural laborers," but instead, were "employees" within the meaning of the Act. Accordingly, the Board has statutory jurisdiction in this matter. There is therefore no reason to revoke the Union's certification.

Inasmuch as the pleadings establish that the Union requested bargaining on and after April 14, and the Respondent refused to honor this request on and after April 25, I find that Respondent thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

In accordance with my findings above, I make the following

### CONCLUSIONS OF LAW

1. The Respondent, Cal-Maine Farms, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, Local 1529, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is now and has been at all times material an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at the Respondent's Edwards, Mississippi egg packing

plant, excluding all guards, office clerical employees, buyers, salesmen, quality control employees, professional employees, confidential employees, and supervisors as defined in the Act.

4. On March 30, 1988, in an election conducted by the Board, a majority of the employees in the unit described above designated the above-named Union as their representative for the purposes of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, on April 7, 1988, the Board certified the above-named Union as such representative.

5. No good reason exists to revoke the aforesaid certification.

6. On or about April 14, 1988, and thereafter the Union requested recognition and bargaining with respect to the employees in the forgoing unit, and, on or about April 25, 1988, and thereafter, the Respondent failed and refused to honor said request.

7. The Respondent's failure and refusal to recognize and bargain with the above-stated Union constituted an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

### THE REMEDY

It having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall further recommend that Respondent be ordered to recognize the Union, and, upon request, bargain with it over rates of pay, wages, hours, and other terms and conditions of employment of the employees in the above-described unit, and, if agreement is reached, reduce such agreement to writing. I shall further recommend that the certification year be extended so as to begin on the date that the Respondent first begins to bargain in good faith with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>28</sup>

### ORDER

The Respondent, Cal-Maine Farms, Inc., Edwards, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize or bargain with United Food and Commercial Workers International Union, Local 1529, AFL-CIO-CLC, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees employed at the Respondent's Edwards, Mississippi egg packing plant, excluding all guards, office clerical employees, buyers, salesmen, quality control employees, professional employees, confidential employees, and supervisors as defined in the Act.

<sup>24</sup> *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-763 (1949).

<sup>25</sup> *Id.*

<sup>26</sup> 29 CFR § 780.191 (1974).

<sup>27</sup> R. Br. 14-15.

<sup>28</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the the above-described Union as the exclusive collective-bargaining representative of the employees in the above-described unit.

(b) On request, bargain with the above-described Union, as the exclusive collective-bargaining representative of the employees in the above-described unit, over the rates of pay, wages, hours, and other terms and conditions of employment of such employees, and, if agreement is reached, reduce such agreement to writing. The certification year is extended so as to begin on the date that Respondent first begins bargaining in good faith with the Union.

(c) Post at its Edwards, Mississippi facility copies of the attached notice marked "Appendix."<sup>29</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>29</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize or bargain with United Food and Commercial Workers International Union, Local 1529, AFL-CIO-CLC, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees employed at the Respondent's Edwards, Mississippi egg packing plant, excluding all guards, office clerical employees, buyers, salesmen, quality control employees, professional employees, confidential employees, and supervisors as defined in the Act.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize the above-described Union as the exclusive collective-bargaining representative of our employees in the above-described unit.

WE WILL, on request, bargain with the above-described Union as the exclusive collective-bargaining representative of the employees in the above-described unit, and, if agreement is reached, reduce such agreement to writing.

CAL-MAINE FARMS, INC.

*Mark J. Kaplan, Esq. and Kathleen McKinney, Esq., for the General Counsel.*

*Kenneth E. Milam, Esq. and R. Pepper Crutcher Jr., Esq., of Jackson, Mississippi, for the Respondent.<sup>1</sup>*

*Roger K. Doolittle, Esq., of Jackson, Mississippi, for the Charging Party.<sup>2</sup>*

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. My original decision in the above-captioned matter issued on August 16, 1989. I concluded that Respondent had failed to prove its contention that, subsequent to April 1, 1988, at its "Old Farm" egg processing plant, at Edwards, Mississippi, it had processed only eggs produced on the farm where the plant is located. Accordingly, citing *DeCoster Egg Farms*, 223 NLRB 884, 886 (1976), I concluded that Respondent's production and maintenance employees at the plant were not "agricultural laborers," but, rather, were "employees" within the meaning of Section 2(3) of the Act. Since the Union had been previously certified as the bargaining representative of such employees and Respondent had refused upon demand to bargain with the Union, I further held that Respondent had thereby violated Section 8(a)(5) and (1) of the Act.

On March 15, 1990, the Board issued its decision in *Camsco Produce Co.*, 297 NLRB 905, in which it overruled *DeCoster* and set forth a new standard for determining the "agricultural laborer" exception to the statutory definition of "employee."

On June 28, 1990, the Board issued its Order remanding the case to me for further consideration consistent with *Camsco*, including, if necessary, a reopening of the record on the issue of jurisdiction. On July 3, 1990, I issued an order requiring all parties to state their positions on whether the record should be reopened. The General Counsel and the Charging Party opposed reopening the record. However, Re-

<sup>1</sup> The first page of the transcript transposes the names of counsel for Respondent and the Charging Party, and is hereby corrected as indicated above.

<sup>2</sup> *Ibid.*

spondent requested a supplemental hearing on the ground that it had evidence pertaining to the jurisdictional issue.

A supplemental hearing was held before me on this matter in Jackson, Mississippi, on October 30, 1990. Thereafter, the General Counsel and Respondent filed briefs,<sup>3</sup> and Respondent filed a motion to correct transcript. Upon the entire record, and upon my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### A. Summary of the Evidence

##### 1. The "Old Farm" and its processing plant

As more fully described in the original decision, the Edwards facility is a farm of about 4000 acres at which Respondent engages in various agricultural activities. The site contains an "Old Farm" at which eggs are laid, and a processing plant at which they are cleaned and made ready for shipment. In addition, an automated New Complex was being built at the time of the original hearing.

Respondent's Old Farm supervisor of shipping and receiving, Robert Turner, provided additional description of the premises at the second hearing.<sup>4</sup> He testified that the processing plant is at the "front entrance" to the Edwards site, and that the "laying houses" are beyond the plant. There is a back road leading to the laying houses which is not visible from the processing plant, where Turner works.

Turner's office is located at the north end of the processing plant. The latter has two docking areas. One is at the north end of the plant, and was characterized by Turner as a "receiving and shipping" dock. Old Farm eggs are not received at this dock, however. Old Farm laying houses are not capable of loading an "18-wheeler," according to Turner. Instead of utilizing the north end dock for receipt of Old Farm eggs, the plant has another dock at its west end. According to Turner, this is a "low dock for them [Old Farm eggs] only [and for] those little small trucks." There are two of them, "dual wheeled, . . . real low to the ground, pulling very small goose-neck trailers."<sup>5</sup> The witness testified that a "dolly" holds 15 cases of eggs.<sup>6</sup> Eight dollies have 120 cases and this generates a "receiving ticket." Each case has a sticker identifying the laying house and class of eggs.

I infer that the north end dock at the Old Farm processing plant can unload "18-wheelers."<sup>7</sup> On the basis of Larry

Bishop's testimony in the first proceeding,<sup>8</sup> Turner's further testimony described hereinafter, and a simple common sense comparison of a "little bitty truck" with an 18-wheel tractor-trailer rig, I find that the latter could hold more than eight dollies of eggs.

##### 2. The completion of the New Complex and egg shipments to the Old Farm processing plant

At the first hearing, Plant Manager King testified that no eggs were produced at the New Complex until January 1989.<sup>9</sup> At the supplemental hearing, Shipping and Receiving Supervisor Turner affirmed that the New Complex became "operational" about July 1, 1989. Testifying on October 30, 1990, Turner stated that the New Complex had begun shipping eggs to the Old Farm processing plant about 2 years before, i.e., in about November 1988. The reason for this was the fact that egg-laying houses at the New Complex were established sequentially, and the New Complex processing machine was not started until the New Complex was producing 200-300 "cases" daily.<sup>10</sup> Thereafter, according to Turner, he obtained eggs from the New Complex only if he needed eggs of a particular size or class.

At the first hearing, in May 1989—i.e., prior to the New Complex operational date of July 1, 1989—processing Plant Manager King testified that he was then processing 2600-2700 "cases" daily from Old Farm laying houses, and 500-600 "cases" from the New Complex. Of the latter, some were processed at the Old Farm, and some were shipped to other of Respondent's locations for processing. Total processing was about 5000-6000 "cases" daily before March 31, 1988, and about 3100 "cases" after that date. King also stated that the difference between total processing figures and Old Farm production could be explained by the 7-day laying time at the laying houses, and the 5-day workweek at the processing plant.

I conclude that the Old Farm processing plant started processing New Complex eggs in about January 1989, and stopped processing them on a regular basis not later than July 1, 1989. Thereafter, the Old Farm processing plant utilized New Complex eggs only if it needed eggs of a particular size or class.

##### 3. The source and receipt of "Old Farm" eggs at the processing plant

The farm workers at the laying houses load the eggs onto dollies, and two drivers of the small, dual-wheeled trucks with the goose-neck trailers deliver them to the "low" dock at the processing plant. The driver tells the receiving clerk the source of the eggs, and is questioned if there are any discrepancies.

<sup>3</sup>Respondent's request to file a reply brief is denied, as the Board's rules do not provide for same at this stage of the proceeding.

<sup>4</sup>Turner was available at the time of the first hearing, but Respondent did not call him as a witness. The General Counsel and the Union objected to much of his testimony on the ground that Respondent was engaging in unwarranted relitigation and the presentation of evidence which it could have given at the original hearing.

<sup>5</sup>See Larry Bishop's testimony in the first hearing, corroborated by Plant Manager King, that eggs are transported from the Old Farm to the processing plant in "little bitty trucks with little old bob-tail trailers." Original decision, sec. B.7.

<sup>6</sup>These vehicles haul eight dollies per load to the processing plant, according to Turner.

<sup>7</sup>See Plant Manager King's testimony in the earlier proceeding, describing shipment from the New Complex to the Old Farm processing plant in "18-wheelers," because the New Complex dock is at "trailer height." Original decision, sec. B.7.

<sup>8</sup>Bishop testified that Respondent loaded more than 8 dollies of eggs onto 18-wheelers at the New Complex—"sometimes 8, 9, 10, 11, 12, 13; it all depends on how many dollies they had."

<sup>9</sup>Original decision, sec. B.3.

<sup>10</sup>One of Respondent's Old Farm egg receiving logs, dated February 1, 1989, contains what was apparently an overlay reading: "Complex eggs received prior to Complex processing started 2/1/89-5/31/89." R. Exh. 2, dated February 1, 1989. The overlay itself is crossed out, but visible. I infer that it was dated subsequent to the date of the exhibit on which it was placed.

The dollies frequently have numerous stickers, and Turner gave confusing testimony about the “sticker” problem. First, he said that a sticker from Old Farm laying houses is distinguishable from a sticker originating in another location. On the other hand, Turner claimed that the clerk has to check and determine the sticker with the latest date. This would seem to be unnecessary if the sticker was from another location, since the eggs presumably had been produced on the Old Farm regardless of the sticker. Of course, the dolly may have had a prior Old Farm sticker with a different date. In some cases the “supervisor over the egg haulers” had to be called.<sup>11</sup>

The receiving clerk records the receipts in an egg receiving log. As more fully described in the original decision,<sup>12</sup> these logs have seven columns, the second of which purports to record the source of the eggs. As previously indicated, this column was originally entitled “Shipping Memo #” and indicated shipments from “Cal-Maine” or “Edwards” for dates after April 1, 1988. Processing Plant Manager King denied that “Cal-Maine” referred to eggs shipped to the plant from other of Respondent’s facilities, and explained the variation in the source designations as differences in recording by different clerks.

As further set forth in the former decision, beginning on November 8, 1988, and continuing thereafter, the heading on the second column of the receiving log was changed from “Shipping Memo #” to “Edwards,” and all entries thereafter in the logs received at the original hearing consisted of ditto marks. In later logs received at the supplemental hearing, the words “Farm Chex,” or “Chex” appear in the second column on occasion.<sup>13</sup> Turner described these as eggs which could not be processed, and had to be broken and placed in tanks.

At the second hearing, Receiving and Shipping Supervisor Turner identified Respondent’s Exhibit 2 as “the Edwards Farm log . . . these are the eggs that we received off the units off the Old Farm.” He acknowledged that the clerk who fills out the log has no independent knowledge of where the eggs are produced. He also affirmed that full dollies could be delivered to the Old Farm laying houses from other sources without his knowledge. Turner agreed that he had changed the designation in the second column of the form to read “Edwards.” He did not recall the date, but testified that it was “after we stopped receiving outside eggs, or we were no longer purchasing eggs.” As indicated, the date of the change on the column heading was November 8, 1988. Nonetheless, Turner contended that no outside eggs had been received at the processing plant since April 1, 1988.

#### 4. Egg receipts at the “high dock”

It is undisputed that, prior to April 1, 1988, Respondent shipped eggs from its contract farm at Mendenhall, Mississippi, to the Edwards processing plant, about 60 miles away according to Turner. At the prior hearing, Plant Manager King could not recall how the Mendenhall receipts were categorized, but contended that they were listed on a separate log. This log was not introduced into evidence at the first

hearing. At the supplemental hearing, Turner identified an exhibit as a part of what he called the “outside log.” It is dated April 1, 1988, and is identical in appearance to the other logs in evidence. The second column is captioned “Shipping Memo #” and lists a series of digits. Under a column entitled “Name” is the word “Seaboard.” Turner stated that the document is in his handwriting, and that he made it on the indicated date, April 1, 1988. Respondent has not submitted any evidence of specifically designated “outside log” entries before or after that date,<sup>14</sup> nor has it submitted a “Mendenhall” log.

Nonetheless, Turner testified about receipt of eggs at the “high dock,” i.e., where the 18-wheelers load and unload. The issue is whether he was referring to current operations only, or also to a prior time in 1988 when the Old Farm processing plant received and processed New Complex eggs on a regular basis for a few months. After his attention was directed to Respondent’s Exhibit 1, the “outside log,” Turner’s testimony reads:

This is on the outside receiving. Me or either my assistants would receive the eggs in. We received all outside, because they came in on an 18-wheeler, and we had to unload them on the high docks, which was the same dock we shipped out on.

Asked whether processing plant employees remove dolly stickers, Turner responded:

Not necessarily, because I don’t have time a lot of time to go pulling stickers off of 28 dollies or eight dollies or whatever is on the load. If it is an outside load, you would have at least 43 or 45 dollies on there. And if it is loaded on the back door, I don’t have time to check each dolly that comes through the door to pull the stickers.

Turner referred to the north dock as the “receiving and shipping dock,” and to “outside load(s).” There is nothing in his testimony to suggest that he was discussing regular egg receipts from the New Complex two years before, in 1988. Although some current receipts may be New Complex eggs of a particular size or class which the processing plant needed after 1988, this could not account for the sticker confusion alleged by Turner with respect to so many dollies. If Turner occasionally sends to the New Complex for some small eggs, he can hardly be unaware of their source. I conclude that Turner acknowledged that the Old Farm north dock regularly receives eggs from sources outside the Edwards site. As noted, the small Old Farm trucks carry only

<sup>11</sup> See the discussion of old stickers in the original decision, sec. B,5.

<sup>12</sup> Original decision, sec. B,4.

<sup>13</sup> R. Exh. 2, supplemental hearing.

<sup>14</sup> Turner identified R. Exh. 2 as “the Edwards Farm log, receiving date 10/20/90, and these are the eggs that we received off of the units off the Old Farm on this date.” The exhibit actually consists of numerous weekly entries running from February 1989 through October 1990. The sixth column, headed “Layer,” has various entries in the different weekly sheets, “New Complex,” “New Complex 1,” “New Complex 2,” “House,” “NC-H1,” or various numerals. The meaning of these exhibits is not set forth in the record. If, as Turner testified, this exhibit records Old Farm eggs received at the Old Farm processing plant, then it is difficult to understand what they were doing at the New Complex, with its own receiving dock and processing plant—if in fact this is where the eggs went.

8 dollies, and thus could not have carried the 28, 43, or 45 dollies mentioned by Turner.

Both James King and Robert Turner were Old Farm processing plant management personnel.<sup>15</sup> Respondent has not called as witnesses any supervisors from either the Old Farm laying houses or the New Complex, both entities separate from the Old Farm processing plant on the 4000-acre Edwards farm.

4. Respondent's "correlation" of egg receiving log entries and management "run sheets"

Respondent's accounting manager at the Old Farm, Gaye Dreher, testified that the Company produces daily "run sheets" on processing production. These sheets have the same ticket number as that appearing on the "egg receiving logs." Respondent sought to introduce these documents, and its counsel stated as follows:

[Y]ou can tie this record of what is packed at that plant directly back to the receiving dock records, the logs that are already in evidence. In other words, there is no hole in the system between the receiving dock and the packing floor.

After objection from the General Counsel, Respondent's counsel continued:

It doesn't eliminate both holes; it just eliminates the hole that you sneaked them past the receiving dock man. . . . [I]t will not eliminate the possibility suggested by the General Counsel that eggs could have been given fictitious sources before they arrived at the back door. What it would eliminate is the possibility that that someone bypassed that back door tracking system and got the eggs on the plant floor, so that you will be able to tie the receiving logs to whatever is packed on the plant floor.

The documents sought to be introduced by Respondent were so numerous and bulky that they would have served little purpose without analysis or agreement of the parties as to their meaning. Upon Respondent's agreement to provide an analysis at a designated time after the hearing,<sup>16</sup> I received them. The analysis, accompanied by a statement from Dreher, was thereafter received. I enter it into evidence sua sponte as Board's Exhibit 1.<sup>17</sup>

The analysis consists of two parts. Part A is an "attribution of runsheet ticket numbers to egg receiving logs" from June 20, 1988, through March 18, 1989; and from October 30, 1989, through December 31, 1989. Part B is a "Comparison of Beginning Inventory & Week's Production to Week's Processing" from June 4, 1988, through October 20, 1990. The entries for each week show beginning egg inventory, the week's egg production, the total of beginning inventory and production, and the week's processing.

<sup>15</sup> At the prior hearing, King stated that he supervised only the processing plant, by which, I conclude, he meant the Old Farm processing plant. He further affirmed that he knew nothing about the laying houses.

<sup>16</sup> The parties were given additional time after the receipt of the analysis for the filing of briefs.

<sup>17</sup> The General Counsel objected to receipt of the analysis.

It would seem that the total of each week's beginning inventory plus production, minus the week's processing, would equal the next week's beginning inventory. However, there are numerous instances where this is not true, and where the next week's beginning inventory is either less or more than the expected amount. Although a lesser beginning inventory may possibly be explained by eggs unfit for processing, a larger than expected inventory raises questions about the source of the unexpected eggs. There are 15 overages between June 25, 1988 and October 20, 1990,<sup>18</sup> the largest an overage of 62,985 dozen on June 25, 1988.<sup>19</sup>

6. The Mendenhall evidence

Respondent submitted records of shipments from Mendenhall at both hearings. For the first hearing, the records started on January 2, 1988, and run through May 20, 1989.<sup>20</sup> At the second hearing, Respondent submitted records ending on December 31, 1988.<sup>21</sup> The last entry for a shipment to the Edwards site is March 31, 1988.

The records contain the names of consignees on the left of each page. For the most part, these names are preprinted. Thus, the name "Edwards" is preprinted on the pages prior to March 31, 1988, but disappears for the first time on the page dated May 7, 1988. Records between March 31 and that date show no entries for Edwards.

On September 17, 1988, the name of a new consignee, "Mexican Exports," is preprinted on the form, and shows shipment of 5544 dozen.<sup>22</sup> The records show shipments to this consignee for the next 5 weeks, but the name "Mexican Exports" disappears on the form for November 12, 1988.<sup>23</sup>

Namon Williams, a witness for Respondent, testified that he was a "truck foreman in the Mendenhall shipping and (receiving)" office. His testimony on direct examination has occasioned a motion by Respondent to correct the transcript. That testimony is as follows:

Q. . . . Would you describe to the judge exactly what your duties at the Mendenhall facility (are) for Cal-Maine.

A. My duties is that I tell the drivers where to go to pick up eggs and where to take them to. And my duties is we haul pulleys to different locations.

Q. And, specifically, how many drivers work for you?

A. Six.

<sup>18</sup> 6/25, 11/19, 12/10, and 12/31, all in 1988; 1/28, 3/11, 3/18, 3/25, 7/01, 7/15, 7/22, 7/29, and 12/30, all in 1989; and 3/10 and 10/20, both in 1990.

<sup>19</sup> The total of the beginning inventory plus the week's egg production for June 18, 1988, was 740,925 dozen, of which 486,660 were processed. This should have left a remainder of 254,265 dozen. Instead, the beginning inventory for the next week, June 25, was 317,250 dozen, an overage of 62,985 dozen. Bd. Exh. 1.

<sup>20</sup> R. Exhs. 2-2.73, first hearing.

<sup>21</sup> R. Exh. 3, second hearing. Namon Williams, a witness for Respondent, testified at the second hearing that two paper-clipped "packets" of documents contained "recaps" of Mendenhall shipments through October 1990. This was then marked and admitted as R. Exh. 3 at the second hearing. As indicated, the last page on that exhibit in the file is dated December 31, 1988. I do not consider the absence of the two "packets" to be significant.

<sup>22</sup> R. Exh. 2.38, first hearing; R. Exh. 3, second hearing.

<sup>23</sup> R. Exhs. 2.39-2.46, first hearing; R. Exh. 3, second hearing.

Q. And . . . where do these drivers actually take the eggs?

A. They take them wherever—you know.

Q. Is there any paperwork involved as far as telling them where to take these—

A. We have a shipping memo that we write the name where to go. And they have pickup tickets that they leave at the farm when they pick the eggs up.

Q. And then what do they do with these shipping memos?

A. They take it to the location where they are going to get it signed and bring a copy back. Then we will match it up, and then we will put it on our weekly log.

Q. Where do you ship the egg(s) that are gathered from—at Mendenhall?

A. We ship most of them to Walker, or we ship some to Texas or Alabama, wherever they are needed—Jackson, the egg product.

Williams agreed that Mendenhall had shipped eggs to the Edwards farm prior to April 1, 1988, but denied that there had been any such shipments thereafter.

Respondent moves to strike the word “pulleys” in Williams’ first answer quoted above, and to substitute therefore the word “pullets.” Respondent argues that it is not engaged in the business of manufacturing “industrial equipment,” but does move young birds, called “pullets,” from place to place.<sup>24</sup> The General Counsel likens the vehicles used by the Mendenhall drivers to the Edwards vehicles described by Turner, which pulled trailers, and argues that the Mendenhall vehicles could have been used to take eggs directly to the Edwards facility.<sup>25</sup>

I deny Respondent’s motion to correct the transcript, since it is obvious from Williams’ testimony that he was discussing the transportation of eggs, not chickens. Williams’ use of the word “pulleys” requires interpretation in light of the entire record. Whatever his meaning, Williams did not describe any vehicles other than those of his drivers, who went to the various locations listed by him.

During cross-examination of Robert Turner, he testified that he was present at a conference with Respondent’s attorney the day before the hearing, that various subjects were discussed, and that Namon Williams was present. During Williams’ cross-examination, he agreed that he arrived at a conference room where Turner and others were present, but denied that he was at “a meeting.” He brought three boxes of documents, but denied that anybody asked him any questions about them.

#### 7. The Hope, Arkansas evidence

Leonard Kropp testified that he had been the majority stockholder in a company called Egg City, in Hope, Arkansas. In October 1988, Egg City was taken over by Cal-Maine, according to Kropp, and he is now the general manager. The Hope location has both egg-laying and processing operations. Kropp characterized the facility as an egg “im-

porter,” i.e., one that has more processing capacity than production, and brings in eggs for processing.<sup>26</sup> Nonetheless, Hope does ship unprocessed eggs to other Cal-Maine facilities on occasion. Some of these are shipped in “cases,” while others, particularly those intended for Cal-Maine’s “breaking plant” in Jackson, Mississippi, are shipped in “plastic filler flats” containing 30 eggs each. These are substandard eggs, and are shipped on dollies carrying a sticker showing that the egg is restricted. The witness identified such a sticker introduced at the first hearing.<sup>27</sup> Regular eggs are shipped in “cases,” and the dollies carrying them have a sticker which identifies Hope, Arkansas as the shipper.

Kropp testified that dollies are not considered to be the property of any particular Cal-Maine location. However, he added, “if we take eggs to the breaking plant . . . we get 15 racks over there, we expect 15 racks [dollies] back.” He denied that any shipments had been made from Hope to the Edwards site, but agreed that he would have no knowledge if dollies with Hope stickers were loaded at other Cal-Maine farms and shipped to Edwards.<sup>28</sup>

As recounted in the original decision, Daisy Bishop, a longtime packer at the Edwards processing plant, testified that in December 1988 she saw 20–30 dollies which looked different from the usual dolly used at Edwards, and 20–40 such dollies in February. Plant Manager King testified that dollies used at different locations are not the same, and that the Hope dolly has a latch. Bishop testified that she saw additional such dollies in March. They had Hope, Arkansas stickers which Bishop distinguished from the restricted sticker used for substandard eggs. Bishop testified: “It just said Hope, Arkansas where the eggs had come from. They was, the sticker was in flat with the eggs.” In addition Virginia Foster, also a long-time employee<sup>29</sup> testified that she saw dollies coming into the plant the week before the first hearing. They had various stickers on them, some from Hope and others from locations in Texas. I credited Daisy Bishop and Virginia Foster. In addition, Larry Bishop, an employee at the New Complex, gave ambiguous testimony which suggested but did not specifically detail the unloading of unprocessed eggs at the New Complex in early 1989 from an 18-wheeler carrying dollies with stickers from Hope (and other locations). Processing Plant Manager King was asked at the first hearing how eggs were recorded that had been received from Mendenhall, “Hope, Arkansas,” or other Cal-Maine facilities and replied that Respondent had a “separate log that we kept on these eggs.”

#### B. Factual and Legal Conclusions

In *Camsco*, supra, the Board stated:

<sup>26</sup> Cal-Maine has 12 facilities according to Kropp, some of which are merely egg-producers and “export” eggs to other Cal-Maine facilities.

<sup>27</sup> G.C. Exh. 5, first hearing.

<sup>28</sup> Respondent proffered voluminous copies of what Kropp identified as shipping documents from Hope to all locations since Egg City was taken over by Cal-Maine. Although a recess was granted for the purpose of seeking a stipulation as to these records, none was offered. I receive the records in evidence as R. Exh. 4, second hearing. A cursory examination of them does not reveal any shipment to the Edwards site.

<sup>29</sup> Foster was discharged at the end of the last week before the first hearing.

<sup>24</sup> Respondent’s motion to correct transcript, dated January 18, 1991.

<sup>25</sup> G.C. Br. 12. The General Counsel also argues that the Edwards “pulling trailers” could have been used for this purpose.

[T]he Board will assert jurisdiction if any amount of farm commodities other than those of the employer-farmer are *regularly* handled by the employees in question. In such a case, the question, properly framed, is whether the commodity handling in question is agricultural work.

Finally, with respect to practical considerations, it is not unreasonable to conclude that a farmer-employer who handles the products of other producers on a regular basis, however small the quantity may be, has departed from the traditional model of the farmer who simply prepares his own products for market . . . . At the same time, for the reasons stated earlier, it makes no sense, given the framework of our statute, to find the agricultural exemption inapplicable simply because on a single occasion, under circumstances that might never occur again, a few commodities from another employer's operation were handled by the employees at issue. [297 NLRB 905. Emphasis in original.]

The Board also reaffirmed that the party asserting the exemption has the burden of proving its application. *Ibid.* On the facts in *Camsco*, the Board concluded that the employer had "not demonstrated that its handling of such mushrooms occurred very rarely, on only an emergency basis." *Ibid.*

Considering first Respondent's "correlation" theory and its "run sheets," counsel candidly stated at the hearing that the theory "doesn't eliminate both holes." Actually, there are several "holes," including receipts at the "high dock" and possible receipts at the laying houses. Turner admitted that eggs could have been received at the laying houses from other sources (via, perhaps, the back road) without his knowledge, and that the "low dock" receiving clerk had no direct knowledge of the source of the eggs which he received. King agreed that he himself had no knowledge of what went on in the laying houses. The unexplained overages in the beginning inventories of Respondent's accounting analysis create further doubts that its documentary evidence accurately reflects egg receipts at the Edwards farm.

Turner's testimony that the date of the change in the title of the receiving log (November 8, 1988) from "Shipping Memo #" to "Edwards" was at about the time the processing plant stopped receiving outside eggs constitutes an admission that Respondent received such eggs after the claimed cessation date of March 31, 1988.

Further, Turner's description of events at the "high dock" shows that Respondent is currently receiving outside eggs. He identified one record of "high dock" receipts as the "outside log," and Respondent gave it a separate exhibit number.<sup>30</sup> Plant Manager King's testimony at the first hearing corroborates Turner—there was a "separate log" on which Mendenhall and Hope, Arkansas receipts were re-

corded. However, the only evidence of this log which Respondent has submitted is the purported entry for only one date has been proffered does not inspire confidence that Respondent has submitted any record of its receipts at the "high dock" save for the alleged April 1, 1988 entry. Nor is there any documentation of the admitted "Mendenhall" receipts prior to the claimed cessation date of March 31, 1988.

Taking these factors into consideration, the absence of entries on the Mendenhall shipping logs showing shipments to Edwards after March 31, 1988, is not persuasive. According to Namon Williams' testimony, the Mendenhall drivers pick up eggs and carry them to various locations in Texas, Alabama, and elsewhere. The signed shipping memos which validate these deliveries and which form the basis of the shipping logs are not in evidence. None of the drivers was called as a witness. Williams himself was an evasive witness, and I do not credit his denial that no shipments were made to Edwards after March 31, 1988. The Mendenhall logs are additionally suspect because of the sudden appearance and disappearance of "Mexican Exports" as a consignee. Mendenhall is a contract farm without a processing plant, i.e., it ships unprocessed, "dirty" eggs. It is doubtful that Mexican law permits the importation of such eggs.

Although there has been some evidence from a witness for the General Counsel of receipt of unprocessed eggs at the New Complex after March 31, 1988, shipment of eggs between the New Complex and the Old Farm processing plant, and evidence of the existence of a back road to the laying houses, Respondent has not called as a witness any supervisor from the New Complex or the laying houses. The only Edwards management personnel whom it called were processing plant supervisors without detailed knowledge of the laying houses or the New Complex. Processing Plant Supervisor William C. Meyers admitted to employees in December 1988 that Respondent had already purchased eggs and was going to buy more.

Respondent's evidence from Hope, Arkansas, is minimized by Kropp's admission that he would not know if Hope dollies are used to deliver eggs from other sources to Edwards, and is offset by the credited testimonies of Daisy Bishop and Virginia Foster showing receipts of eggs with Hope stickers, by the testimony of Larry Bishop, by the testimonies of Robert Turner and James King about activities at the "high dock" and the "outside" or "separate" log, and by the admission of Supervisor Meyers.

A review of the evidence at both hearings shows that Respondent has not established by a preponderance of the evidence that, since April 1, 1988, it has not received outside eggs at its Edwards, Mississippi processing plant on a regular basis, or indeed, that it is not doing so at the present time.

Accordingly, I reaffirm my Conclusions of Law and my recommended Order set forth in my prior decision in this matter, dated August 16, 1989.

<sup>30</sup> R. Exh. 1.